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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1960

No. 883

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, a voluntary labor association; FRANK W. GLASS, individually and as Vice President of the Brotherhood of Locomotive Firemen and Enginemen; J. H. McCARVEL, individually and as General Chairman of the Brotherhood of Locomotive Firemen and Enginemen; BROTHERHOOD OF RAILROAD TRAINMEN, a voluntary labor association; H. E. NEVALA, individually and as Deputy President of the Brotherhood of Railroad Trainmen; and R. R. McLEAN, individually and as General Chairman of the Brotherhood of Railroad Trainmen,

Petitioners,

vs.

BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, a corporation,

Respondent.

BRIEF FOR THE BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY IN OPPOSITION

OPINIONS BELOW

The order of the District Court is unreported (Pet. p. 42). The opinion of the Court of Appeals is also unreported (Pet. p. 33).

JURISDICTION

The judgment of the Court of Appeals was rendered on January 10, 1961.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Whether the United States District Court for the District of Montana properly denied petitioners' motion for leave to file a proposed supplemental answer and counterclaim, which was first made eleven months after judgment was rendered in the original cause and three weeks after the said judgment had become final by virtue of this Court's denial of a Petition for a Writ of Certiorari.

STATUTES INVOLVED

Federal Rules of Civil Procedure.

Rule 13:

"(a) *Compulsory Counterclaims.* A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was com-

menced the claim was the subject of another pending action. As amended Dec. 27, 1946, eff. March 19, 1948."

Rule 13 (e).

Rule 13 (f):

"(f) *Omitted Counterclaim.* When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment."

Rule 15 (a); *Rule 15* (d).

Rule 59 (e):

"(e) *Motion to Alter or Amend a Judgment.* A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment. Added Dec. 27, 1946, eff. March 19, 1948."

Rule 60.

STATEMENT

The statement contained in the petition (pp. 7-14) sets forth the facts and chronology of events material to consideration of the question presented.

ARGUMENT

Petitioners' motion for leave to file a supplemental answer and counterclaim was a double-barrelled attempt to (1) require the respondent to restore the "status quo" existing prior to institution of the original injunction action by respondent and (2) to nullify the force of the Montana State Court injunction which prohibited The Anaconda Company from taking the work claimed by petitioners from the jurisdiction of the International Union of Mine, Mill and Smelter Workers.

The claim for restoration of the "status quo" is clearly a compulsory counterclaim which under the provisions of Rule 13 (a) is barred unless timely pleaded. The ruling of the District Court on this point which was affirmed by the Court of Appeals presents no novel or important question which need be decided by this Court. Neither is the decision in conflict with any decision of another Court of Appeals on the same matter.

Petitioners did not even attempt to make any showing of excusable neglect which might move the lower court to exercise whatever discretion it may have had in the matter in petitioners' favor.

The portion of the proposed supplemental answer and counterclaim which in effect sought to defeat the jurisdiction of the state court had nothing to do with the merits of the original action.

Petitioners were making a second effort to obtain relief which was denied them by the Court of Appeals when they sought a Writ of Prohibition against the

Montana state court on May 18, 1959. In that case this court denied certiorari on October 19, 1959 (361 U.S. 846).

Then, as here, the petitioners sought to stay the jurisdiction of the Montana court without first attempting or exhausting the available and proper remedy of intervention in the Montana action.

As was pointed out in the decisions of the District Court and Court of Appeals, there is no conflict between state court action and the District Court judgment; hence, there is no need for the federal courts to exercise any control over the state court proceedings. Even if a conflict existed, it would be incumbent upon petitioners to intervene in the state court action and demonstrate any conflict there, thereby giving the state court the opportunity first to resolve the conflict if such there be.

It is respondent's position that, even if the proposed supplemental answer and counterclaim were proper, it was not timely and is barred by Rules 59 and 60.

CONCLUSION

Respondent submits that the determination of the issue in this case amounts to a factual and legal determination properly made adversely to petitioners under the Federal Rules of Civil Procedure. The decision of the Court of Appeals did not reach any important question of federal law which has not been, but should be, settled by this court, nor was the de-

cision in conflict with that of any other Circuit Court of Appeals on the same matter or with any applicable decisions of this court. For these reasons we submit the Petition for a Writ of Certiorari should be denied.

Dated, Butte, Montana,
May 5, 1961.

Respectfully submitted,
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